DOCUMENT RESUME

ED 472 614 EA 032 238

AUTHOR	Cartwright, Gene J.; Schwartz, Allen D.
TITLE	The School Official's Guide to Student Disciplinary Hearings. Second Edition.
INSTITUTION	Illinois Association of School Boards, Springfield.
PUB DATE	2002-01-00
NOTE	66p.
AVAILABLE FROM	Illinois Association of School Boards, 430 East Vine Street, Springfield, IL 62703 ($7 members; $8 nonmembers; plus $4 shipping and handling). Tel: 217-528-9688; Web site: http://www.iasb.com.
PUB TYPE	Guides - Non-Classroom (055)
EDRS PRICE	EDRS Price MF01 Plus Postage. PC Not Available from EDRS
DESCRIPTORS	Administrator Guides; *Administrator Responsibility; *Administrator Role; Board Administrator Relationship; *Board of Education Role; *Discipline; Elementary Secondary Education; Expulsion; *Hearings; *State Legislation

ABSTRACT

Student disciplinary proceedings often present a challenge for school-board members and school administrators alike. One of the biggest obstacles to fairness in any school-related hearing is the potential for confusing the roles among administrators and the board. It may be impossible to avoid all these role conflicts in some situations, but this practical guide will at least make the parties aware of the potential for conflicts and the steps necessary to ensure a fair hearing for the student. Five chapters deal with various aspects of disciplinary proceedings: (1) "Why Hearings?"; (2) "Roles and Responsibilities"; (3) "Organizing the Expulsion Hearing"; (4) "Conducting the Hearing"; and (5) "Some Related Questions." This guide attempts to provide an understanding of the hearing procedures and options available to participants. It does not, however, evaluate every situation that might arise or anticipate future court action, and, therefore, should not be treated as a substitute for legal counsel. Because different states provide different statutory mandates for their school districts, it is highly recommended that hearing participants become familiar with the laws in their own states. An appendix contains a summary of pertinent case law. (RT)

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The School Official's Guide to Student Disciplinary Hearings.

Gene J. Cartwright and Allen D. Schwartz

January 2002

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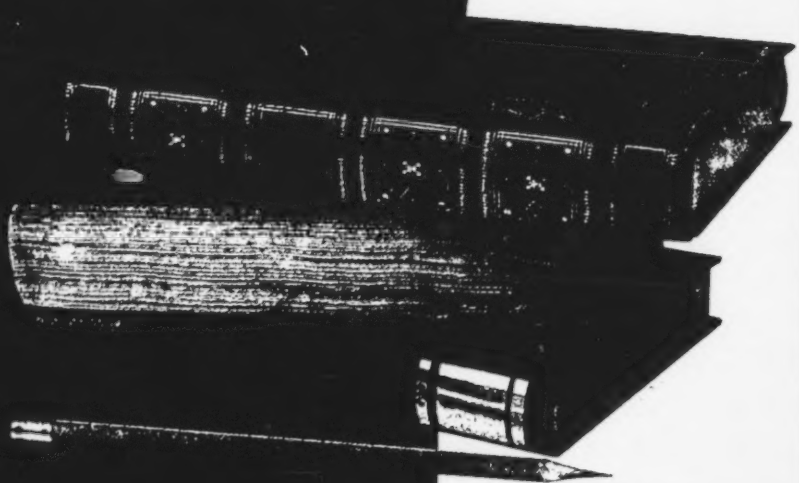

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The Authors

The Illinois Association of School Boards expresses special appreciation to **Alan M. Mullins** for taking on the task of updating *The School Official's Guide to Student Disciplinary Hearings*.

IASB also remains extremely grateful to **Gene Cartwright** and **Allen Schwartz** for authoring the original edition of this Guide in 1986. Their handbook has served as a major source of insight for school disciplinarians and boards of education in Illinois and elsewhere for more than 15 years. This Second Edition captures the new wrinkles and nuances introduced to the arena of student discipline over those 15 years.

Alan Mullins is an attorney specializing in school law with the firm of Scariano, Ellch, Himes and Petrarca, Chrtd., Chicago. He has authored a number of articles on legal matters for *Illinois School Board Journal* and served as a presenter several times at the Joint Annual Conference of IASB, IASA and IASBO. He also served for several years as staff attorney for Community High School District 218, in Oak Lawn.

Gene Cartwright, now retired, served a quarter century as a district superintendent in both Illinois and Wisconsin and was involved in some 500 student disciplinary hearings. **Allen Schwartz**, also now retired as a partner with the law firm of Robbins, Schwartz, Nicholas, Lifton & Taylor, Ltd., is a former school board member and former chief legal advisor to the Illinois superintendent of public instruction.

Second Edition (revised): January, 2002
First Edition: June, 1986

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Foreword

Student disciplinary proceedings often present a challenge for school board members and school disciplinarians alike. Unfortunately, neither can avoid such proceedings. Although their jobs are very different, disciplinary hearings are part of the job for both board members and administrators.

Fortunately, the task for both board and administration was made significantly easier and much less intimidating by Gene J. Cartwright and Allen D. Schwartz. Their original work on the *School Official's Guide to Student Disciplinary Hearings,* published by IASB in 1986, cleared away much of the mystery surrounding disciplinary hearings and forms the foundation for this 2002 edition.

In this new edition, Alan M. Mullins has revised and updated the text with the latest information from school law and case law, bringing school boards and administrators up to date on the practical aspects of student disciplinary hearings. While little has changed in the essence of this publication, these revisions make it as timely and accurate as possible.

One of the biggest obstacles to fairness in any school-related hearing is the potential for confusing the roles among administrators and the school board. Statutes in some states, including Illinois, contribute to this confusion by seeming to overstate the authority of school officials or by failing to note essential differences in roles. Thus, school boards that are required to function as impartial hearing bodies are sometimes encouraged to take on adversarial or investigative functions. By the same token, district superintendents who often function as "prosecutors" in student expulsion hearings are treated instead as advisers to the boards. It may be impossible to avoid all of these role conflicts in some situations, but this practical guide will at least make the parties aware of the potential for conflicts and the steps necessary to ensure a fair hearing for the student.

One major achievement of this book is the way in which it views the due process hearing from the perspectives of the different participants – the student, the school board or hearing

officer, and the administrators who recommend disciplinary action. Knowledge of how to keep these roles separated throughout the hearing, deliberation and decision-making process should enable school officials to proceed with confidence.

As the authors demonstrated in the original book and again in this edition, there is no one correct way to conduct a student disciplinary hearing. The degree of formality called for varies with the nature of the alleged misconduct, the severity of the proposed punishment, the extent of the student's record and, ultimately, his defense. Moreover, although every hearing must meet certain standards of fair play, those standards are not cast in ironclad state law; rather, they are deduced from court decisions and may be frequently re-interpreted by new court decisions.

This guide does attempt to provide an understanding of the hearing procedures and options available to the participants. It does not, however, evaluate every situation that might arise or anticipate future court action. Therefore, it should not be treated as a substitute for legal counsel.

School officials in states other than Illinois must also keep in mind that disciplinary statutes vary from state to state. The basic concepts of due process as imposed by the U.S. Constitution and federal courts apply equally to all. But different states may provide different statutory mandates for their school districts. Thus, it is essential to become familiar with the law in your own state.

1/Why hearings?

Due process

The U.S. Constitution extends certain rights to all citizens. Some of these rights are substantive, some are procedural.

Substantive rights are the basic rights guaranteed by the Constitution, such as free speech, protection from unreasonable search and seizure, and the right against self-incrimination. Federal courts have held that the right to attend a public school is a substantive right.

Procedural rights are those guaranteed by the "due process" clauses of the Constitution. Procedural due process provides that substantive rights may not be taken from a person without following certain procedures in order to ensure that those rights are not mistakenly taken. Federal courts have held that public school students have certain *procedural* rights that must be followed whenever their *substantive* right to an education is in jeopardy.

It is well established that if school officials intend to deprive a student of a substantive right (the right to attend school for any length of time), they must follow a certain procedure to do so. The extent of the procedure depends on the length of time for which the student will not be allowed to attend school. At the least, students' procedural rights include informal meetings with disciplinarians in which the reasons for the proposed disciplinary actions are explained and an opportunity to respond is afforded. Procedural rights may also include the right to a hearing before the school board, or a hearing officer, for long term deprivations and sometimes include the right to a review by a court of law.

Three kinds of hearings

Student disciplinary hearings fall into three categories:

• **Pre-suspension hearing**. Prior to the imposition of discipline, students must be advised of the charges and evidence against them and be given an opportunity to respond. This

requirement applies to an in-school suspension for any period of time as well as the removal from school. (An exception is where immediate removal is necessary because the student poses an immediate threat to students or staff.) Although this is the least formal procedure conducted by the school disciplinarian, the pre-suspension hearing is very important. Failure to provide this hearing invalidates the entire disciplinary process from the start.

• **Suspension hearing.** Suspension means removal from school for a limited time (10 days is the maximum suspension in Illinois). In Illinois and many other states, the superintendent, principal, assistant principal or dean may be authorized by the school board to suspend students from school. Most state laws do not require a formal hearing unless parents ask to have the suspension reviewed by the school board. In reviewing a suspension, the board would either uphold the suspension, shorten it, or reverse it and presumably expunge it from the student's records.

• **Expulsion hearing.** Expulsion means removal from school for a substantial length of time. In Illinois, an expulsion is the removal of a student from school for 11 days up to two calendar years. (The Gun-Free Schools Act requires school boards to expel students who bring weapons to school for not less than one year. The school district's chief administrative officer can modify the one year requirement on a case by case basis.) Only the school board may remove a student for that period of time. There are three different roles played at the expulsion hearing. The administrator functions as the "prosecutor." If a hearing officer conducts the hearing, that person functions as the "judge" and the board is the "jury." If a hearing officer is not used, the board operates like a "judge" in a non-jury case. Based on the evidence, the school board determines whether the student is guilty of the charges and, if guilty, whether the misconduct merits expulsion.

A student may not be expelled until the school board acts. (This may require a special board meeting so that the board can consider the expulsion before the suspension ends. Otherwise the student will return to school until the board takes formal action.) In most situations, the student is suspended pending an expulsion hearing—in which case, the expulsion hearing

also serves as a suspension review hearing. If the school board decides not to expel the student, it also may decide to reverse the suspension and expunge the student's record.

Questions also arise as to whether hearings or other procedures are called for in other disciplinary situations. That is, what due process rights should be extended prior to removing a student from class, keeping a pupil after school, having a pupil wash the chalkboard or withholding extra-curricular privileges—such as a field trip or participation on an athletic team? The answer to most such questions is, other than confronting the student and listening to his or her explanation, none. However, each situation should be evaluated on its own merits, and if necessary, with the aid of legal counsel.

In some situations, school officials may offer "fair play" even where they believe no substantive right is involved. There is nothing wrong with providing an informal process, including an informal hearing, when one is not required by law. However, if a hearing is convened, it should be conducted properly. A mishandled hearing can provide the student with a basis for claiming that rights were given by school officials and were violated—even though no hearing was originally required.

Suspension hearings

Most student suspension cases never reach a review hearing. Following the informal hearing given by a school administrator prior to suspending a student (which must be given), Illinois law requires that written notice be sent to the student's parents or guardians. The notice must state the reasons for the suspension and the duration. It also must state that upon request of a parent or guardian, the school board will review the suspension.

If a review is requested, the school board or a hearing officer must conduct a hearing. The hearing must be carried out in a manner similar to an expulsion hearing. However, evidence regarding the facts of the case are unnecessary if the student admits the facts but argues that the punishment is not warranted. If the board elects to have a hearing officer conduct the hearing, the hearing officer must give the board a written report. The board must base its action on the hearing officer's report. The board may uphold the suspension, shorten the sus-

pension, or overturn the suspension and expunge the student's record.

Expulsion hearings

An expulsion hearing should be treated as a rather formal procedure. Although the hearing need not meet the standards of a courtroom trial, and although many rules that apply in a courtroom do not apply at a hearing, there are some similarities. The student must be allowed to have legal representation, to present a defense against expulsion, to present evidence and witnesses and to cross-examine the administration's witnesses. The school board, in its role as a jury or judge hearing the evidence, must not confuse its role with that of the administrator who is making the case for expulsion.

As with a hearing to review a student suspension, the school board may employ a hearing officer to conduct the expulsion hearing. The hearing officer must present the board with a written summary of the evidence presented by the administration and the student, and the arguments of each for and against expulsion. The school board must make its decision based on the summary.

The expulsion law in Illinois

Illinois school boards and administrators run a serious risk of misconstruing student expulsion procedures if they read Section 10-22.6 of *The School Code* as stating all of the applicable law. It does not. Although the statute does not contradict standards for due process enunciated by the U.S. Supreme Court, it presents some broad terminology that must be read with constitutional case law standards in mind.

Section 10-22.6, for example, refers to the expulsion hearing as an opportunity for parents to "discuss their child's behavior." Yet, the due process standards established by the U.S. Supreme Court call for procedures that exceed a simple "discussion." Moreover, the Illinois statute provides no insights into the different roles that must be played by the school board and the administrator. Nor is it completely clear as to the function of the school board hearing officer.

Consequently, it is possible for school officials to err in establishing expulsion procedures based on only the apparent

meaning of Section 10-22.6. For instance, the roles of the administrator and the hearing officer can easily be confused, imposing on the latter the investigative and administrative functions that rightfully belong with the former. In fact, the hearing officer must provide the same kind of impartial hearing that the board of education would provide if it were hearing the case directly. This is not completely clear in *The School Code,* but must be inferred by applying standards set forth in various U.S. Supreme Court decisions.

Factors to consider in expulsion

The courts give school officials broad discretion in determining what discipline is appropriate for each case of misconduct. In reviewing whether that discretion has been abused, courts in Illinois will look at five factors:

1. the egregiousness of the misconduct;
2. the history or record of the student's past conduct;
3. the likelihood that such conduct will affect the delivery of educational services to other students;
4. the severity of the punishment; and
5. the interests of the student.

School boards should consider these criteria when deciding the discipline to be imposed for student misconduct.

2/Roles and responsibilities

Policies and rules

Expelling a student from school for any length of time is never a pleasant event for anyone involved. School board members and administrators, perhaps more than most people, can appreciate the seriousness of depriving a student of an education. Many school districts, in fact, go to great lengths to provide disruptive students with alternative programs in lieu of expulsion, usually in more restrictive settings.

School district expulsion policies that protect the rights of students must provide:

- Adequate warning of the types of behavior which may lead to expulsion;
- Adequate administrative procedures leading up to the decision to recommend expulsion, especially for conducting the investigation;
- Timely and informative notice to the parents and the student, indicating what the administration is recommending and why, and which informs them of their right to contest that recommendation;
- A fair hearing and an impartial decision by the board of education.

Courts consistently hold that a rule must exist before it can be broken and that a student must be made aware of the rule before he can be punished for breaking it. Thus, it is essential for the school board to adopt policies and enact rules of student conduct. (Typically, the administration develops a code of conduct for the board's approval.) The rules of conduct and the consequences of violations must be communicated to students in some written form such as a student handbook before discipline can be enforced. (Note: An exception to the requirement that there be a rule of conduct is where the conduct is so grossly disobedient or abhorrent that no warning is necessary.)

Once rules and consequences are developed and published, the roles of the school board and administrator diverge. Stated

briefly, the role of the administrator is to enforce the rules; the role of the board is to review that enforcement.

The board of education

Because its primary functions are to set policy and monitor its execution, the school board is largely a legislative body. The board enacts policies governing all aspects of school operations in it's legislative capacity, including student conduct.

However, the school board must shift from its legislative role to a judicial role when a student is recommended for expulsion or when a student decides to contest a suspension. The board serves as "judge and jury" in weighing the evidence and deciding whether a student shall be removed from school.

The decision to expel a student can be made only by formal, public vote of the school board following a hearing. To ensure that the board and its decision are impartial, it is essential that:

- Members of the board should not be involved in investigative activities or preliminary discussions leading up to the expulsion recommendation.
- The student must be allowed to dispute evidence and cross-examine those witnesses presented by the administration.
- The student must be allowed to present witnesses and other evidence.
- The board must not assume the role of prosecutor.
- The hearing must be conducted in a manner that does not violate the student's right to due process.

Although the student must be allowed to have legal counsel and to present evidence, both federal and state courts have consistently held that a student expulsion hearing need not take the form of a judicial trial. Moreover, although there may be exceptions, rules of evidence do not usually apply. Where issues regarding the conduct of the hearing or the admissibility of evidence arise, the individual presiding over the hearing must decide them. Many boards employ an attorney to guide them through hearings or to be the hearing officer for that reason.

Bifurcated hearings—Typically, an expulsion hearing presents the school board with not one, but two decisions:

- Is the student guilty of the alleged wrongdoing?
- If the student is guilty, is expulsion appropriate?

A question arises as to whether the expulsion hearing must be bifurcated and handled in two parts. That is, must the board first hear evidence regarding the issue of guilt and then deal with the issue of punishment? No court has required a bifurcated hearing in an expulsion case to date. School boards typically hear all of the evidence regarding both guilt and punishment before deliberating and voting. However, most courts also agree that the board should be careful not to let a student's record of prior wrongdoings prejudice its determination as to guilt or innocence. Boards should strive to consider guilt first and punishment second.

There may be situations where the board might want to make a decision on guilt before listening to arguments regarding the punishment, or a board may simply wish to conduct all expulsion hearings in a bifurcated manner.

In the majority of expulsion cases, guilt is not a serious issue. Administrators rarely recommend expulsion until or unless it is clearly established that the student actually committed the wrongdoing. Evidence that the student did commit the act must be presented to the board, of course, and entered into the record even if it is not a serious issue. Such evidence should be entered into the record even when the student admits to the act in case the student later changes his story.

Most student disciplinary actions are contested on the issue of whether expulsion is appropriate for the misconduct or whether there are extenuating circumstances that make expulsion inappropriate. That is, the student and parents and their attorney are more likely to argue that (a) the school rule calling for expulsion is too severe or (b) there were mitigating circumstances that warrant a less severe punishment.

Decision and formal action—The student or his attorney must be given an opportunity to present evidence, including their own witnesses, and to cross-examine witnesses presented by the administration. Both sides also should be allowed to make closing statements if they wish. Those statements can relate to the student's guilt or the appropriate punishment. Any hearing officer report should fully describe all evidence and statements. Following closing statements, the board should

have heard all the evidence there is to hear.

It would never be appropriate to conduct or discuss a student disciplinary case in public session. The board should meet in a closed session to conduct hearings or consider hearing officer reports. Where the board itself conducts the hearing, other parties involved should be excused before the board begins deliberations as to guilt or innocence.

In those cases where the superintendent makes the case for expulsion, the superintendent should be excluded from the board's deliberations. Some districts have the principals make the expulsion recommendation, thereby allowing the superintendent to remain in executive session. The board could then properly seek the superintendent's advice as to the extent of discipline to be imposed.

The board's attorney does not have to be excluded from the deliberations if the attorney acted as the hearing officer. There is no conflict of interest in acting as the hearing officer and the board's advisor because the hearing officer acts as a neutral. However, the attorney should be excluded from deliberations if the attorney presented the case for expulsion at the hearing because that activity is not neutral.

Board members discuss the issues and evidence among themselves in executive session and attempt to arrive at a consensus as to whether the student is guilty of the alleged violations and then whether the student (if guilty) should be expelled or otherwise disciplined.

Although board members should not be influenced by the student's past record in determining guilt or innocence, past record is important in determining whether to expel and, if so, for how long. It is imperative that the punishment fit the misconduct. It is also important that the board have a consistent discipline policy, but that does not mean that all students have to receive the same punishment for the same misconduct. The individual's record, particularly discipline history, should be examined—but only after guilt is established. Just as a three-time offender receives a more severe sentence than a first-time offender in criminal court, a student who is a disciplinary problem should receive a stronger form of discipline. Likewise, there may be mitigating factors about the misconduct that may be reason to give a less severe punishment. The board can consider all those factors and does not have to give the same punish-

ment for the same offense in all cases.

The school board's final step is to convene in a public session and formally vote on a motion or resolution to expel, if expulsion is the consensus arrived at in executive session. Typically, the student's name is not used in a public session. Rather, some other designation, such as a student number, is used to identify the student. Naturally, the student and parents should be notified by written notice of the board's action.

Written decision—School boards are not required to produce written decisions in expulsion or suspension proceedings. Hearings may be recorded by court reporter or tape recording. Although recording is not required, it is recommended that the hearing at least be audio-taped in case the student contests the board's decision. The student should be allowed to record the proceedings if desired, in which case the school board should arrange for its own recording.

Hearing officers and board committees

In Illinois, *The School Code* authorizes school boards to use hearing officers to conduct student disciplinary hearings. The hearing officer may be an attorney, school employee or an independent third party. It is recommended that an employee from the school the student attends not conduct the hearing when a board employee is used.

A committee of the board may also function in the same capacity as a hearing officer. The key point is that the hearing officer or board committee must function as a "stand in" for the board.

Many boards prefer to use hearing officers because it reduces the number of meetings members must attend and because it is easier to schedule hearings for one hearing officer than for a number of board members. It also allows all members to participate equally, unlike when a board committee is used.

The hearing officer or committee must conduct the expulsion hearing in essentially the same fashion as the school board would. The difference is that the hearing officer or committee cannot and should not substitute its judgment for the judgment of the full board. Only the full board can expel. In Illinois, the hearing officer or board committee is required to prepare a

clear and unbiased summary of the evidence. The school board takes action based on that written summary of the evidence. An inaccurate or biased presentation of the evidence is a good target for litigation.

Thus, the hearing officer's report to the board should provide the full flavor of the evidence. It must report the evidence presented by both sides. Although the report probably should not draw conclusions or make a recommendation one way or the other, the hearing officer should offer observations regarding the evidence. For example, the board should know what evidence came from eye witnesses and what is based on hearsay or second-hand information. In addition, since the board is not able to observe witnesses, it would be proper for the hearing officer to make observations regarding the credibility of witnesses.

The board may and should, so as to avoid discussing confidential information about students in public, consider the hearing officer's report in executive session only. The board should not call upon the hearing officer for additional comments or clarification. To do so would invite arguments in the case and an unconscious attempt to influence the school board. The hearing officer's role is not adversarial or advocacy—it is fact finding. If the hearing officer's report falls short, then a full board hearing should be convened to cover the points that are unclear in the report, or the report should be sent back to the hearing officer to re-convene the hearing to cover those points.

After deliberating on the hearing officer's report in executive session, the board must convene in public session to take action—the same as it would for any other matter discussed in executive session.

The administrator

The administrator responsible for student disciplinary actions varies among districts. Typically, it is the principal or dean of students who handles discipline. The recommendation for expulsion is directed to the school board through the superintendent.

Naturally, the administrator should bring expulsion recommendations before the board only after a thorough investigation of the facts and analysis of the evidence in relation to the

district's rules of student conduct. Some districts use an administrative panel to evaluate each case and to advise or direct the disciplinarian on how to proceed. However, most boards direct the administration to bring all cases regarding certain violations, i.e., weapons or drugs, to the board for its consideration.

Special education review—It is also essential to determine whether the student's conduct is related to a handicapping condition. A special education student cannot be expelled unless the conduct or violation is not related to the student's disability. A special education staffing must be conducted to determine whether the conduct is related. If the improper conduct is so related, the student may not be expelled. Instead, the student's educational program must be restructured to meet his or her needs.

A potentially serious problem is created by the regular student who has a special education need that is not recognized until the improper conduct occurs. If there is any hint that this may be the case, the student's possible need for special education should be investigated before expulsion is recommended. An expulsion is not valid if it is later determined to be for a special-education related problem.

Administrative procedures also must include arrangements for the disciplinary hearing, including such tasks as:

- setting the time and place;
- notifying participants, including school witnesses;
- making physical arrangements;
- preparing necessary documents.

The attorney

Every school district should obtain legal advice in developing student discipline policies and in working out disciplinary hearing procedures. Once procedures are standardized in conformance with the law, some school boards will want an attorney on hand to prosecute the case on behalf of the administration, to help the hearing officer or board, or to act as the hearing officer. Some boards have an attorney present in one of these capacities for all hearings. Others have an attorney present for only difficult or extraordinary hearings.

In a seriously disputed case where the student and admin-

istration have employed attorneys, the school board should consider using an attorney to act as the hearing officer. This attorney would conduct the hearing, keep order and rule on objections to the evidence raised by either side.

The atmosphere of fairness may depend upon a neutral attorney employed to conduct the hearing or advise the board or hearing officer. Without using an attorney to conduct the hearing or to advise, the board or hearing officer may be tempted to ask the administration's attorney for advice on how to rule on objections raised by the student's attorney.

Witnesses

The attorneys or other representatives of the administration and the student should be invited to make opening statements and closing arguments. Other than that, all evidence is presented by sworn witnesses or through documents. The board does not have subpoena power. Even the student whose expulsion is sought cannot be forced to attend the hearing. Nor can the student's parents be required to attend. (Refusal of the student and parents to take part in the hearing after proper notice effectively waives their right to contest the facts of the case, of course. The administration should still present a shortened version of its case for the record in those instances.)

Each witness in a formal hearing should be sworn on oath to tell the truth by either the hearing officer, court reporter, or board president. (The oath is not necessary in an informal hearing.)

The first witness usually is the administrator who is recommending expulsion. His or her task is to lay out the case for expulsion in general by explaining which school rules have been broken, citing the evidence that shows the student committed the alleged misdeeds, and explaining why expulsion is the appropriate remedy. The administrator seeking a student expulsion also will present other witnesses and evidence. Other witnesses could include:

- Individuals who saw the student commit the alleged misconduct or were involved in the incident themselves;
- Other individuals who took part in the investigation of the misconduct.

Also, if an issue is raised as to whether the student's conduct is special-education related, witnesses would include educational specialists who took part in evaluating the student and can vouch that his conduct is not related to a handicapping condition. A report from such specialists may also be used.

Most school officials agree that students generally should not be called by the administration as witnesses at an expulsion or suspension hearing if calling them can be avoided. School life can become difficult for students who side with the administration against another student. Administrators usually testify as to what they were told by students. However, that may not be permissible in light of a recent Illinois appellate court case. (See "Right to confront and cross examine witnesses" in the Appendix, page 57.) An exception to not calling students might be where crucial evidence presented by an adult witness must be confirmed by a student. Another factor might be whether the student is mature enough to handle peer pressures after the hearing.

Obviously, there is no set number of witnesses that the administration should present to support its case for expulsion. There is some strength in sheer numbers, but balancing of numbers is not conclusive. Eye-witnesses—individuals who actually saw an event take place—are particularly important.

3/Organizing the expulsion hearing

Application of the Open Meetings Act

The Illinois Open Meetings Act provides that a school board may meet in closed session to handle student disciplinary cases. Student privacy rights make it inadvisable to ever hold a student disciplinary hearing in public or for a school board to discuss such a matter in public.

When a disciplinary hearing is to be conducted by the school board at other than a regularly-scheduled meeting, the board must post notice of a special meeting. The board must also post an agenda for the special meeting. (The school board may include matters in addition to the discipline hearing on the agenda.) The meeting must be started as any other special meeting would be started by calling the roll of the board members. Because the meeting would be open to the public, the board must then adopt a formal motion to go into a closed session for the hearing. The roll call and motion must be reflected in board minutes for that meeting.

The board should adopt a policy or resolution authorizing the board president (or other presiding officer) to conduct the hearing and to issue rulings on objections and the admissibility of evidence during the hearing. Without this authority, it can be argued that any such ruling requires a motion and vote of the full board.

It is not necessary to take the actions described above prior to a hearing conducted by a hearing officer because the Open Meetings Act does not apply when the board does not attend the hearing. However, the Act does apply if a committee of board members acts as the hearing officer.

The closed hearing, of course, is not completely closed. In addition to the school board or a hearing officer, participants will include the student, the student's parents and possibly an attorney, the "prosecuting" administration team, witnesses, and perhaps an attorney advising the school board. No one else

should be present without a legitimate reason for being there.

When the hearing concludes, the school board retires to deliberate by itself. That means the parties representing both the student and the administration are excused. The school board may be accompanied in executive session by its attorney and/or the superintendent - *but only if these individuals played no part in presenting the case for the administration*. No one who is not clearly a neutral should be involved in the board's deliberations.

The school board must return to open session when it has completed its deliberations. A motion to expel a student can only be approved in open session. The board must vote to adjourn after it has completed its business.

The time

Typically, the administration wants to conduct student disciplinary hearings before any suspensions expire and before the next board meeting. However, hearings must be scheduled at a time that is convenient for every one. For hearings before the board of education, this means picking a time of day when board members can be present. The meeting time also must be convenient for the student, the student's parents and attorney, but claims of inconvenience that are not bonafide should not be allowed to serve as a delaying tactic. Postponements should be granted, but only for good reasons. It is a good idea to contact the parents before scheduling the hearing to agree on a date and time so as to avoid postponements.

Advance notice

Due process requires that parents receive advance notice of an expulsion hearing. Illinois law requires the notice to be sent by certified or registered mail. However, an Illinois court has ruled that a notice which was hand delivered instead was sufficient to uphold an expulsion because the parents had actual notice. The notice must state the time, place and purpose of the meeting, and inform the parents of the student's right to be represented. It's also recommended that a copy of the notice be sent to the parents by regular mail or hand delivered as a precaution against registered or certified mail being refused or otherwise not received. A copy should be sent to the student

who is no longer a minor to avoid a student claim of parental conflict of interest.

The law does not specify how far in advance parents must be notified. Seven days before the hearing is probably adequate time, keeping in mind that the parents may want to obtain legal counsel and prepare a defense. Another Illinois case found two days sufficient under the facts of the case. However, two days will be insufficient in most cases, unless agreed to by the parents.

As shown in the sample on pages 24-25, the notification should set forth the student's right to a hearing and right to legal counsel, explain the expulsion procedure, and describe the charges against the student.

Where the hearing will be before a hearing officer or a committee of the board, the letter of notification should so state. The letter also should point out that the hearing officer or committee will make a written report to the board of education and that the board will make its decision based on the information in that report.

Essential documents

Documents that must be copied and made available for a student expulsion hearing include:

- A copy of the rule violated and any available proof that the student was aware of the rule, such as a receipt showing the student received a student handbook or a student rulebook;
- Copies of notices and other materials provided to the parents;
- Any written statements from the student, other students or other witnesses;
- Any written evidence such as administration investigation reports or police reports that will be used to support the recommendation for expulsion;
- Any portion of the student's school records which the board may review in determining the appropriate punishment, such as teachers' reports, academic reports and discipline history. (You would be surprised at how many times parents are unaware of some of this information.)

Evidence that the student was aware of the school rule and

Sample notice of hearing

(date)

Dear (parents):

This letter is to notify you that the administration of School District (*number*), *(county), (complete address)* is recommending the expulsion of your son *(or daughter), (name of student),* from school because of gross disobedience and/or gross misconduct. If approved by the Board of Education of District (*number*), the expulsion will be effective from *(date)* until (*date*). The specific charges giving rise to the expulsion recommendation are as follows:

> *(Describe the date, time, place and nature of the behavior or incident(s) giving rise to the expulsion recommendation, and cite the rule violated or the appropriate section of the district's discipline code.)*

As the parent *(or legal guardian)* of *(student's name),* you are hereby requested to appear with *(student's name)* at a hearing before the Board *of* Education *of* District *(number) (or a hearing officer representing the Board of Education)* to hear information and evidence regarding these charges. The hearing will convene at *(time),* on *(date),* at *(address),* in *(room number).* The hearing is being held in accordance with Section (*number*) of *The* School Code of *(state)* and the policies of the Board *of* Education of District *(number)* and is not open to the public.

The school administration will present information and evidence supporting the expulsion recommendation at the hearing. Under the laws of the State of *(name)* and the policies of the Board of Education, your son *(or daughter)* has the right to be represented by legal counsel at the hearing, to cross examine witnesses, and to present witnesses and written evidence rebutting the charges against him (*or her*). Your son *(or daughter)* can also present arguments as to why expulsion is not an appropriate pun-

evidence that he or she broke the rule should be presented before the board considers any historical information. Although it probably is not essential from a legal standpoint, it is a good idea to segregate material that relates to the student's prior record of school performance and behavior from records related to the latest incident.

Additional items from the student's records will no doubt vary from case to case, but should most likely include the student's disciplinary record for the current school year, information related to previous expulsions or suspensions and the terms of any probation, copies of any other incident reports filed

ishment.

Following the hearing, the Board of Education will consider the information and evidence presented at the hearing and then convene in a public meeting to take formal action on the expulsion recommendation. You will be notified by mail of the Board's final action.

ALTERNATIVE PARAGRAPH WHERE HEARING OFFICER IS USED:

Following the hearing, the hearing officer will prepare a written summary of the information, evidence and arguments presented and submit a report to the Board of Education within *(number)* days. The Board of Education will discuss the hearing officer's report in executive session before taking final action on the expulsion recommendation. You may be notified of the date, time and place of the Board of Education meeting and invited—at the Board's option—to appear and make a statement on behalf of your son *(or daughter)*. You will be notified by phone call of the Board's final action.

Both the administration and the Board of Education of District *(number)* view expulsion from school as a serious matter deserving thorough deliberation. If you have any questions or need additional information, please call *(name of appropriate administrator)* at *(telephone number)*.

Sincerely yours,

(*name*)
Superintendent of Schools
School District (*number*)

by staff, attendance records, reports of contacts with deans, grade transcripts, and the like. It is best to present those records to the board or hearing officer after the issue of guilt has been addressed.

Naturally, documents that will be presented at the hearing or given to the board should be shared with the parents of the student and their attorney. In Illinois there is no statutory obligation to offer this material to parents. However, both state and federal statutes require that parents be granted access to student records upon request and give them the right to challenge their contents. Moreover, failure to fully inform the student and

parents in advance of the charges and the nature of the supporting evidence could cast doubt on the fundamental fairness of the hearing. It is a good idea to give the student a copy of all documents that will be entered into the record some time prior to the hearing.

Be sure that these materials are readable. If inferior copies need to be retyped, note thereon that they have been retyped. Also, plainly mark each packet "Confidential" and be careful to ensure that packets are available only to individuals who have a lawful right to see them. The District also needs an established practice for storing or disposing of all the copies after the board has reached a decision.

The hearing room

Student disciplinary hearings should be held in locations that are both easily accessible and free from disruption or distraction. Because confidentiality must be maintained, the room also must be secure or remote enough to ensure privacy. The school board meeting room may be appropriate. So might any other large conference room. A school cafeteria or an open area of the library is not usually a good place to hold such a hearing.

Physical arrangements should provide reasonable comfort for participants with adequate attention to seating, lighting, and work surfaces. Physical arrangements can say a great deal about the school board and its intentions. Seating for the student, his parents and attorney, for example, should have the same proximity to the school board as does seating for the administration. Seating can reflect an intention to provide a fair hearing, or it can convey the message that the school board (the judge) is teamed up with the administration (the prosecution) against the student (the accused).

There is no one correct way to arrange seating for a student disciplinary hearing, but the illustrations on pages 28 through 31 suggest some acceptable layouts. It is not necessary to make the hearing room resemble a courtroom. However, some of the more formal elements that are characteristic of courtrooms serve important purposes in a hearing room. Certain arrangements of tables and chairs lend themselves to good communications, for example, because they provide good eye contact and ease of hearing for all participants. These arrangements tend to

give an appearance of formality and should not be discarded simply because they look overly formal.

On the other hand, it is possible to conduct a perfectly fair and legal hearing with all participants gathered around a large table, or even seated in a circle with no table at all. The advantage of seating participants at tables is that work surfaces make it easier to deal with documents entered as evidence and other printed matter. The major criteria for determining a suitable arrangement are:

- All participants should be made to feel that their presence is desired at the hearing and should be made reasonably comfortable;
- Representatives of the administration and those of the student should be treated with equal deference;
- The school board (or its hearing officer) should be able to obtain a clear grasp of the information or arguments presented by both sides.

Recording the hearing

Some type of record of the entire student disciplinary hearing should be made. This can be accomplished by a transcript prepared by a court reporter or an audio tape of the hearing. A court reporter is not required and the additional expense is not justified except for extraordinary cases or those cases that have a high probability of being contested in court.

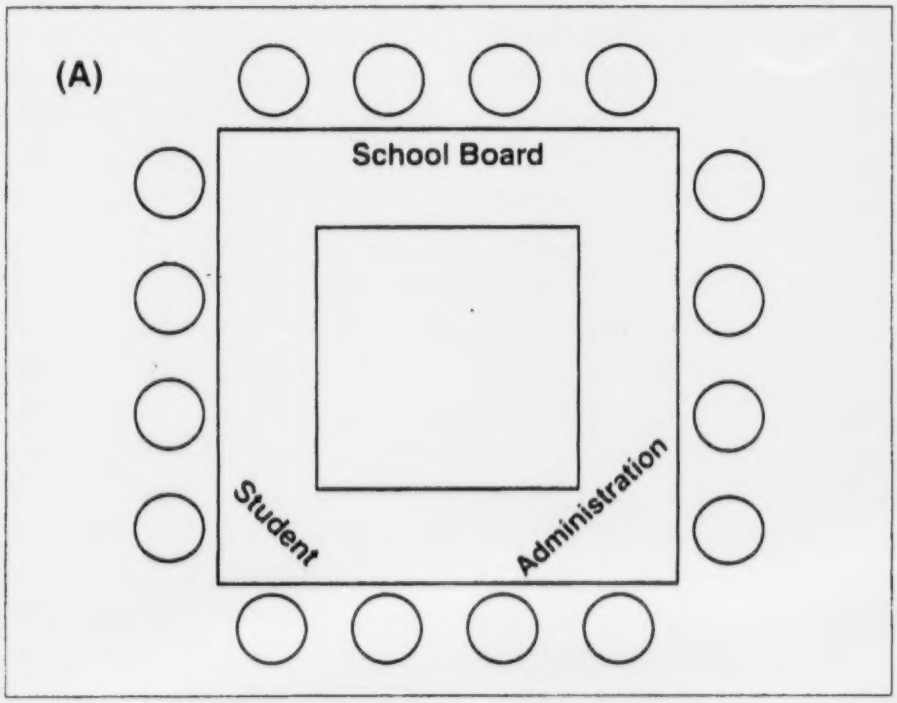
If the full board hears the case, adequate minutes are necessary to prove that the hearing was conducted properly. In Illinois, the Open Meetings Act permits disciplinary hearings to be closed to the public. The Act also requires that minutes of a closed meeting state the time, place and purpose of the meeting, identify persons present, and summarize anything that is proposed or discussed. When someone is designated by the board president to keep notes that will help the board when it deliberates on the evidence, those notes normally can satisfy the requirements of the Illinois law. The minutes of a disciplinary hearing, of course, would not be made public, but would be filed with confidential minutes of other closed meetings.

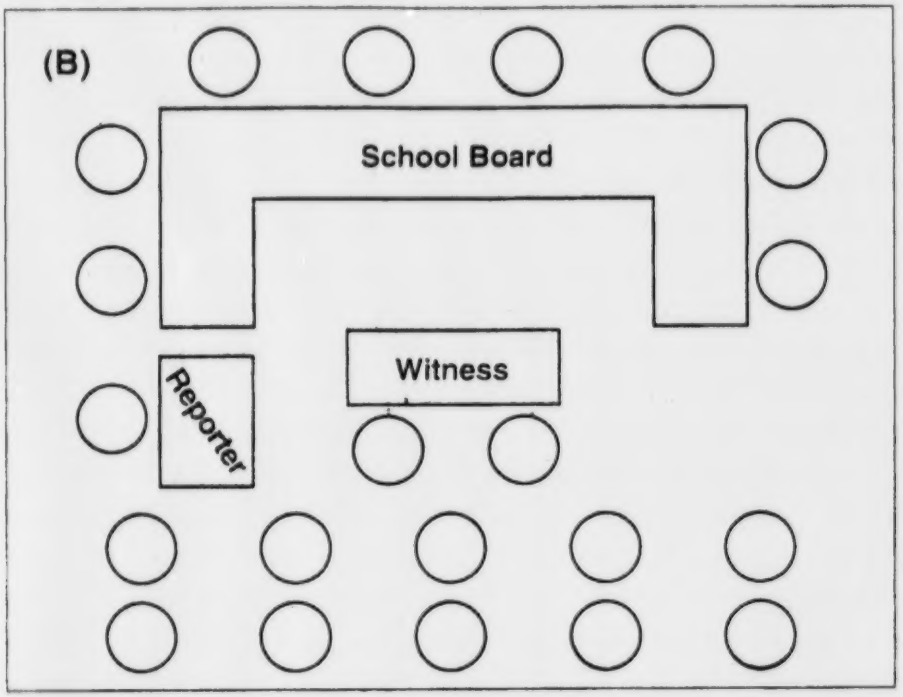
Room arrangements for hearings before the Board of Education

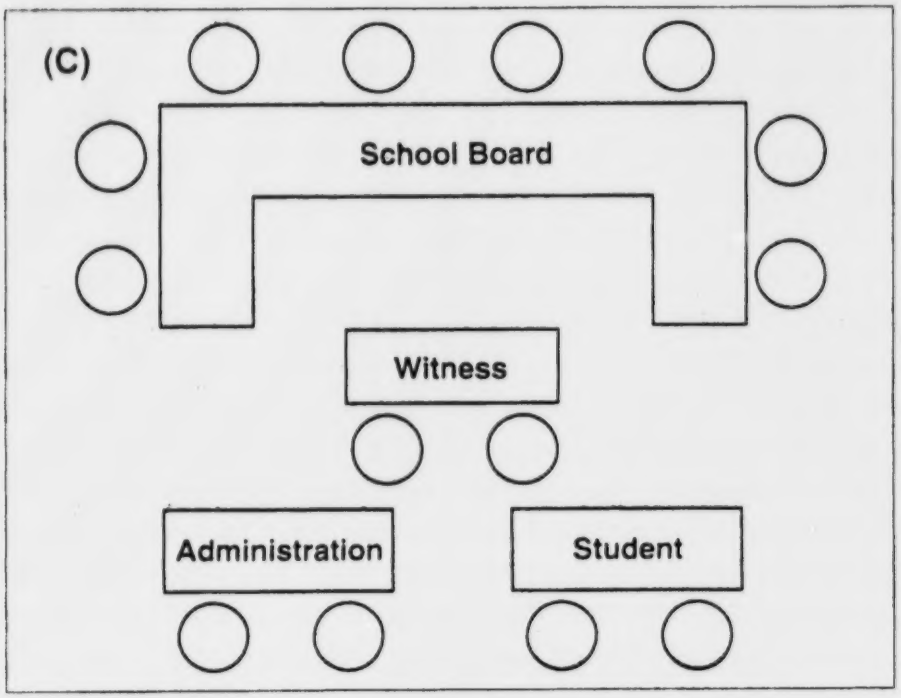
The arrangement below (A) inhibits eye contact between some participants, but otherwise promotes easy communication.

In (B) at upper right, representatives of the administration and those of the student sit out front until called to the witness table.

Placing school board members around a table shaped in a "U" or "V," as shown in (C) at lower right, provides each board member with good eye contact with most participants. The tables for the administration and the student can be arranged in different ways to suit available space.




(B)
School Board
Witness
Reporter

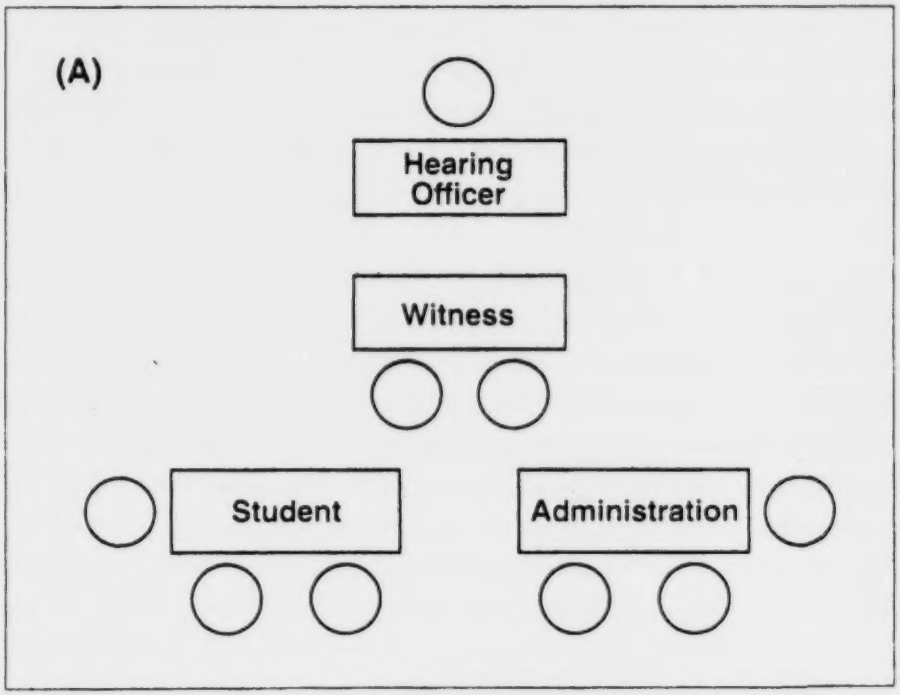

(C)
School Board
Witness
Administration
Student

Room arrangements for hearings before a Hearing Officer

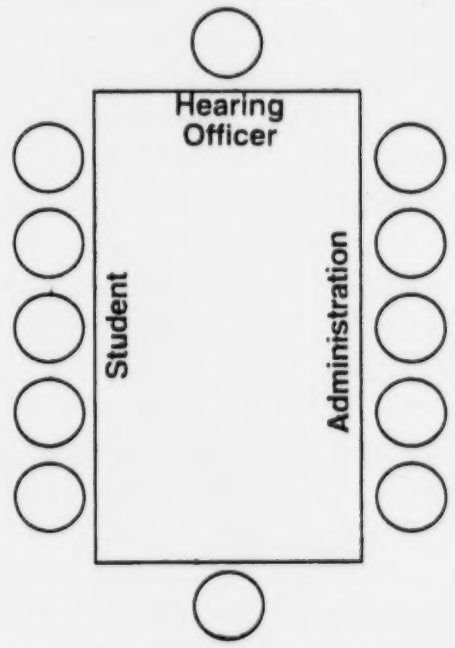
The formal arrangement in (A) below can be made less formal by eliminating the witness table and allowing witnesses to address the hearing officer from where they are seated. Another informal variation would be to retain the witness table and eliminate the larger tables, seating administration and student representatives in chairs arranged theater style.

In (B) at upper right, the chair at one end of the table (opposite the hearing officer) can be assigned to the court reporter, with participants asked to speak from where they are seated. To be somewhat more formal, the foot of the table can be used for witnesses addressing the hearing officer.

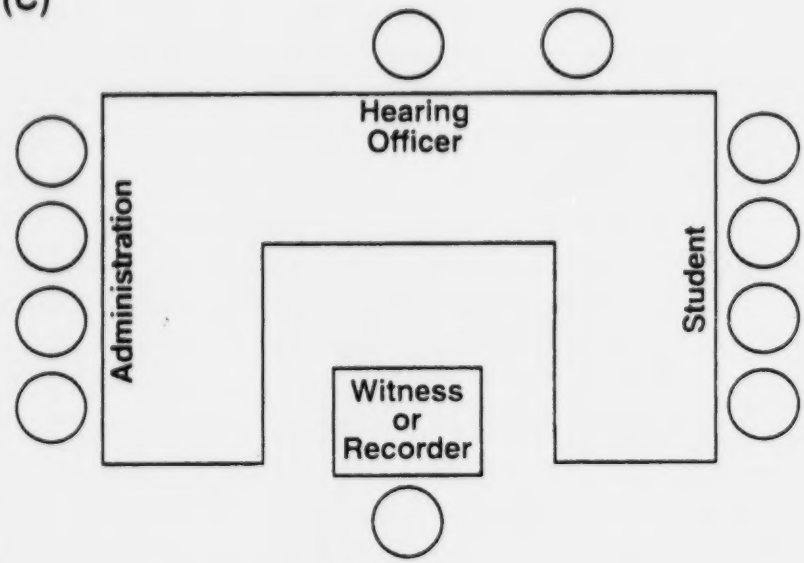
The arrangement at lower right (C) is kept informal by having witnesses testify from where they may be seated and placing the recorder next to the hearing officer and use the small table for witness testimony. This makes the arrangement more formal and creates better eye contact with witnesses.



(B)


Hearing Officer
Student
Administration

(C)


Hearing Officer
Administration
Student
Witness or Recorder

4/Conducting the hearing

Setting the tone

Members of the school board (or the board hearing officer) must remember that a student disciplinary hearing presents them with a *judicial* role. They must approach the hearing with impartiality, and their demeanor must reflect an intention to provide fundamental fairness. Their behavior must be above reproach. The student and his parents should be accorded the same courtesies as are accorded the administration at the hearing.

Formal v. informal procedures

As indicated in Chapter 1, the laws in Illinois and some other states give school officials rather wide discretion in the conduct of student disciplinary hearings. The hearing can amount to an informal exchange of information and viewpoints with the school board, administration and student seated around a table, or it can reflect formal courtroom arrangements with the various parties seated at separate tables and with attorneys examining and cross-examining witnesses.

Most disciplinary hearings probably need to be somewhere between these two extremes—formal enough to ensure that the case against the student is fully presented and that the student has an adequate opportunity to present a rebuttal, yet not so formal that procedures require judicial expertise. The question most likely to confound the school administrator is, just where between these extremes do our hearings need to be? Determining the degree of formality called for means answering such questions as: How will evidence be presented and by whom? Who will question witnesses? What rules of evidence will be observed?

The best answer is that most disciplinary hearings can be kept relatively informal as long as the student is confronted with all of the administration's evidence and given an opportu-

nity to respond to it. In an informal hearing, the administrator can simply describe the case against the student, present written reports and ask a few sworn witnesses to describe in narrative fashion what they know or what they saw. However, some situations call for more formal procedures. Each school district can develop its own routine procedures for conducting disciplinary hearings, but ought to be prepared to shift into a more formal mode when:

- The student has denied guilt;
- The witnesses tell differing versions of what occurred;
- The charges against the student are potentially criminal in nature;
- The alleged infraction has become a controversial issue in the community or has created public pressure on the school board;
- An attorney is representing the student.

In these special situations, the administrator should review the facts with the school attorney to determine whether a formal approach should be used. If it should be, then it is advisable to put the case in the hands of the attorney. Few administrators are trained to properly organize and present a case in a formal manner.

In the most formal of hearings, evidence may be presented through direct examination and cross-examination of witnesses. Witnesses will be sworn and instructed to answer only the questions asked without additional comments. Moreover, judgments must be made as to the admissibility of various types of evidence. Some written documents entered into the record must be authenticated, and there may be testimony by expert witnesses. The existence of these variables suggests that it is the rare student disciplinary hearing that needs to be conducted in exactly that fashion—but when in doubt, it is probably best to lean toward the more formal.

Most cases, except for entirely informal hearings, fall on the spectrum between informal and most formal. Furthermore, the degree of formality called for—based on the seriousness of the charges or the extent of dispute—probably determines whether the administration should handle the case or put it in the hands of an attorney.

The order of events—an overview

The order of events should be planned so that evidence is presented and rebutted in a way that avoids confusion. The presiding officer should open the meeting by explaining the purpose of the hearing (as described more fully later in this chapter).

The administration should go first and present its case for expulsion, explaining the reason for the expulsion recommendation and presenting evidence that the student violated a school rule. The presiding officer should offer the student an opportunity to cross-examine each witness for the administration before that witness is discharged. The student presents his or her case after the administration has presented its case. As discussed later in this chapter, the student's representative might choose any of several appropriate approaches, ranging from a total denial of guilt to an admission of guilt with a plea for forgiveness.

The presiding officer should ask for closing statements after the student's side of the issue has been presented, with the administration going first. The administration's closing statement might include a brief review of the infraction and the evidence. It might also include a rationale as to why expulsion is in the best interests of the school.

The student's closing statement might review evidence presented in rebuttal, as well as make an appeal for forgiveness based on the student's good school record or mitigating circumstances surrounding the infraction.

Following the closing statements, the presiding officer adjourns the hearing. If a hearing officer or committee has conducted the hearing, the next step is to prepare a written summary for the full school board. If the full board has heard the case, the board can convene in executive session to deliberate.

Following school board deliberations, the board must convene in a public meeting to take action in order to expel the student.

Opening the hearing

Regardless of whether the hearing is formal or informal, the hearing officer, the school board president or hearing committee chairman should open the meeting by entering some key

facts into the record. The following statement is an example:

> (Identify self.) Let the record show that this is a student disciplinary hearing held on *(date, time and place)* pursuant to the School Code of the State of *(name)*, before *(name of hearing officer, Board of Education, or committee)* of School District *(number), (county)*. This hearing is being held to hear information and evidence regarding the recommended expulsion *(or challenging the suspension)* of *(student's name)* from School District *(number)* for the period beginning *(date)* and ending *(date)*.

Other information that the presiding officer should recite for the record includes:

- Identification of all persons present, including each person's school district position or relation to the student;
- Confirmation by the student and parents that they received notice of the hearing;
- Overview of the hearing procedures that will be followed;
- Date, time and place the board will consider the charges if the full board is not conducting the hearing.

In identifying persons participating in the hearing, the presiding officer should indicate whether the student is present and whether he or she is accompanied by his parents and/or an attorney. He also should indicate who is presenting the case for expulsion on behalf of the administration and whether that individual is represented by legal counsel. Finally, he should identify members of the board (or board committee), the school board attorney, the court reporter, and any witnesses present.

In describing the purpose of the hearing, the presiding officer might say something to this effect:

> A student can be expelled from school only by formal action of the Board of Education. Before the Board can decide whether *(student's name)* should be expelled, it must determine whether he/she has, in fact, violated the school's disciplinary rules, based on the evidence presented today. If the board determines that *(student's name)* has violated a school rule, it must determine if expulsion is the appropriate punishment. This hearing is designed to protect the student's due process rights during the presentation of that evidence.

Procedures will vary, of course, depending upon whether the hearing is formal or informal, or whether it is before a hear-

ing officer, a committee or the full board. The description of the procedures should reflect these differences. A hearing officer might describe the procedures as follows:

> We will begin these proceedings by *(name of individual representing administration)* summarizing the charges against *(name of student)*. He will then present information and evidence supporting those charges in the form of written documents, student statements and the testimony of witnesses. The student and his parents *(or their attorney)* will be given an opportunity to cross-examine any witnesses presented by the administration and to challenge any of the written evidence entered.
>
> Following the presentation of the administration's case for expulsion, the student and his parents *(or their attorney)* will have an opportunity to present evidence contesting the charges. They may present oral or written evidence. The student and the parents can argue that expulsion is not an appropriate remedy even if the student broke a school rule and may call witnesses to testify. The administration will be given an opportunity to cross-examine any witnesses presented by the student and to challenge any written evidence.
>
> Both the administration and the student will be given an opportunity to make closing statements if they wish.
>
> No decision regarding the recommended expulsion will be made today. As hearing officer, it is my responsibility to prepare a written report of the information and evidence presented by the administration and on behalf of the student. My report will be presented to the Board of Education for review and formal action at a later date. The Board will make its decision based on my report and its discussion of it in executive session.
>
> The executive session of the Board is tentatively scheduled for *(date, time and place)*, and it will be followed immediately by a public meeting at which time the Board will take formal action on the expulsion recommendation. The student will not be identified by name but will be identified by (*describe method*). The student and parents will be notified of the final decision by mail.

Where the hearing is held before the full school board, the final two paragraphs of the above would be replaced by:

> Following closing statements, the Board will convene by itself to deliberate. We will first consider the validity of the charges against the student by examining the evidence presented. If the Board believes that the student is, in fact, guilty of the charges, it will then determine whether expul-

> sion is the appropriate punishment. In the second phase, we may look at the student's past record of discipline and school performance and hear the recommendation of the Superintendent of Schools as to the appropriate educational response to the infraction.
>
> Finally, the Board will convene in a public meeting and take a formal vote on the administration's recommendation to expel. The student will not be identified by name but will be identified by (*describe method*).
>
> All interested parties are invited to attend the public meeting. The parents and student will be notified by mail of the Board's final decision.

These opening statements regarding procedures provide a road map for participants who have not previously participated in a disciplinary hearing. It informs them of what to expect and when they can present their case or make their arguments. It also reassures the parents and student that there will be proper regard for due process rights. Explaining how the hearing is going to be conducted also instills confidence in the school board or hearing officer.

Presenting the case for expulsion

Once the presiding officer has set the stage for the hearing, he should call on the administration to present the case for expulsion. In an informal situation, the administrator who is bringing the expulsion recommendation may be introduced and asked to present a summary of the evidence in narrative form and the reasons for his recommendation. The actual evidence supporting the expulsion is presented by individual witnesses who tell the hearing officer what they know about the incident in narrative form also. It may also be presented through documents. As discussed in the Appendix, page 57, it is not clear in Illinois whether student statements as described by someone else may be used in lieu of student testimony.

In a formal setting, it is more appropriate to have someone function as the "conductor" of the administration's case. This person introduces witnesses, has them sworn in, and elicits evidence from them through a question-and-answer format. Where the administration has employed an attorney, the attorney would conduct the case. Where an attorney is not employed, this role may be filled by the principal or some other administrator who is not going to present evidence as a wit-

ness. Although a question-and-answer format may be used, it does not have to be as formal as a trial. The witnesses may be asked broad questions (such as when did the incident occur, who was present, where did it occur and what occurred) and allowed to describe the event in response to each question. However, leading questions, those in which the answer is given and the witness only has to answer yes or no, should not be used.

For the record — Whether the hearing is formal or informal, the administration's first step should be to present certain essential information and see that it is entered into the record. This information should include:

- Documentation showing that pertinent laws and due process requirements have been met up to the time of the hearing. Documents would include copies of official notices sent to the student and parents informing them of the hearing and of their legal rights, and any receipts showing that the notices had been received. (If such documentation is not available, the parents should be asked on the record if they received the notice.)

- The specific school board policy or school regulation that the student has allegedly violated. A copy of the policy and the student discipline handbook should be introduced, along with any oral or written evidence showing that the student and his parents were given a copy of, or were otherwise aware of, the disciplinary rule prior to the alleged incident or misbehavior. (Two rules of "due process" are that (a) there must be a rule and (b) the student must have been made aware of the rule—unless the infraction is so gross as to violate common standards of conduct.)

- The administration also should indicate whether the charges were evaluated by appropriate specialists and found to be unrelated to any handicapping condition. Any related documentation should be entered into the record.

If the administration fails to offer the above information, the presiding officer should ask for it. If the school board's attorney is on hand, he should examine documents entered as exhibits, if he has not already done so, to determine whether they meet minimum legal standards. The school board, as well as the administration, has a stake in the legal sufficiency of the hearing.

Stating the charges — The administration must first describe the incident or misconduct allegedly engaged in by the student to begin building the case for expulsion. The complaining administrator should present this explanation at the request of the presiding officer in an informal setting. In a formal setting, the complaining administrator would be presented and questioned by the school attorney or by another administrator. Any investigation reports may be introduced at this time or later when the investigator testifies.

The student's past record — The school board should evaluate the evidence regarding guilt on its own merits. Therefore, where the student has denied guilt or where there may be disagreement as to the seriousness of the student's conduct, the administration should bring up the student's past record after testimony on the charges has been heard. However, a recommendation to expel is sometimes based on a series of infractions over a long time rather than on a single infraction or is based on the violation of the terms of a probation. That is, school rules may provide that an accumulation of minor infractions—such as swearing or smoking on school grounds—is punishable by expulsion. Where the student is recommended for expulsion for being caught smoking on school grounds for the fourth time, the three previous infractions would have to be discussed as part of the administration's case for expulsion.

Moreover, an expulsion recommendation may be based on the student's total record of misconduct during the current school term. The record would probably involve a variety of infractions of different types, none of which by itself may be punishable by expulsion. In such a case, the administration will depict a student who has proved himself unable to function acceptably in any of the settings available through the school district, including alternative education programs. The administration will need to describe the student's total record of performance, present documents supporting that record, and possibly present teachers and counselors who can shed light on the student's behavior. The administration also should document all efforts that have been made to help the student develop acceptable behavior and all warnings given the student.

What the administration should *not* do, in any case, is to use past behavior history to paint the student as a bad or unde-

sirable person in an effort to influence the school board's decision as to whether the student did or did not commit a particular infraction.

Keep in mind that, if the student has a favorable prior record, he or his attorney probably will bring that out during the hearing. The student's record—good or bad—will no doubt be a factor in the board's final decision regarding expulsion or some other punishment. However, the board should not allow that record to be a significant factor in determining whether the student is guilty of a particular deed.

It is suggested, therefore, that the administration's case for expulsion should focus on the infraction(s). That is, the administration should describe the nature and relative seriousness of the infraction and present evidence that the accused student is the guilty party. If deemed appropriate, the student's past record of school performance and conduct can be presented in the administration's case or after the board has determined guilt. The student must be given an opportunity to respond to that information. It is imperative that the student and parents be given all information the board will receive and an opportunity to address that information if desired. Otherwise there will be grounds to overturn any board decision.

Presenting and swearing witnesses

Any witness appearing before the hearing officer or school board, including administrators who are presenting evidence, should be sworn to tell the truth. A court reporter, who is a certified official of the courts, may be assigned to swear in witnesses. If a court reporter is not on hand, the presiding officer should administer the witnesses' oath. Witnesses can be sworn in as they are called to testify or sworn in as a group before the first witness testifies.

The administrator or attorney conducting the case for the administration will then call witnesses to present evidence supporting the contention that the student is, indeed, guilty of the alleged infraction. As indicated earlier, witnesses in an informal setting may simply be asked to tell what they know. In a formal approach, they would be asked to respond only to specific questions.

Many times students do not deny the charges. If the hear-

ing is conducted before a hearing officer, the administration should still present an abbreviated version of its evidence that proves the charges. It is not uncommon for a student to change his mind and take a different position when the case goes before the board.

The presiding officer should give the student or his representative an opportunity to question each witness in turn as presented by the administration. Moreover, there appears to be no reason why the hearing officer (or members of the hearing board) should not seek clarification by asking questions of witnesses presented by either side. Of course, their questions must be carefully stated to avoid the appearance of bias toward either the administration or the student.

Hearing the student's side

Once the administration has completed its case for establishing guilt, the student must be allowed to rebut the charges and/or present evidence on his own behalf. Obviously, there are several options open to the student, including:

- He may remain completely silent—in which case the board can only base its decision on information presented by the administration. It is not necessary for the student to present any evidence for a proper due process hearing; it is necessary only that the student have an opportunity to present evidence.
- He may deny guilt without presenting evidence.
- He may deny guilt and present witnesses and other evidence to support his case.
- He may admit guilt—expressly or by implication—and attack instead the appropriateness of expulsion as the proposed punishment. For example, the student may contend that the school rule is unclear or describe mitigating circumstances surrounding the infraction.

Challenging the allegations—If the student and his parents disagree with the administration's charges, they must be allowed to rebut them in an orderly but thorough manner. The student should be allowed to speak for himself (under oath), to call other witnesses, and to present other evidence in an effort

to refute the administration's allegations. Denial of guilt can take various forms, of course. The student may contend that he was not involved at all, for example, or that he was merely a follower and not a ringleader. Moreover, the student's attorney may call various school officials to the witness stand, including the administrator who is recommending expulsion, in an effort to dispute the evidence against the student, to bring out the student's exemplary school history, or even to show that the administrator bears a grudge against the student. Just as the student was allowed to question the administration's witnesses, the administration should be allowed to question any witnesses appearing on behalf of the student, including the student himself.

No defense—The student and his parents may choose not to challenge the administration's charges. They may admit guilt or say nothing at all. Even when admitting guilt, however, they may choose to question the expulsion recommendation as being too severe or unfair or bring up mitigating circumstances. In a strictly formal proceeding, the presiding officer may ask the student's representatives to wait until the closing statement to bring out these latter concerns. In an informal setting, there is no sharp distinction between the presentation of charges and evidence and the closing statements. In a formal hearing, however, it may be helpful to make this distinction so that the student's side can be given "the last word" before the board adjourns to deliberate.

If it is clear that the student and his parents do not wish to address the question of the student's guilt, then the presiding officer might ask the administration to make its closing statement. A question directed to the student might clarify the situation:

> So as to expedite this hearing on the question of guilt, do you wish to challenge the administration's contention that you committed *(describe the infraction)*? You are free to deny this contention and to present any evidence you wish in your defense. If you do not challenge this contention, we shall ask the administration to complete its case with a closing statement, including its recommendation for appropriate punishment. We will then give you an opportunity to make a final statement, including anything you might wish to say about the proposed expulsion.

Request for dismissal—The student's attorney may decide that the evidence presented by the administration is not strong enough to meet the burden of proof necessary to sustain expulsion (i.e., it is more likely than not that the student committed the infraction). In that case, the attorney may ask the board to dismiss the charges even before launching a defense for the student.

If the student's attorney enters a motion for an immediate dismissal of the charges, the presiding officer should respond: "We will take your motion under advisement and consider it when we consider all of the evidence presented at this hearing." The student's attorney then has a choice of (a) presenting evidence in the student's behalf or (b) declining to present evidence and resting entirely on his motion for dismissal.

If the student's attorney decides not to present evidence, the presiding officer should thank the attorney for his cooperation and then ask the administration whether it has anything to add by way of a closing statement before the board adjourns to deliberate the case.

Closing statements

When both sides have made their cases (or had an opportunity to do so), the presiding officer should invite the administration and then the student to make closing statements. Closing arguments must be based on evidence introduced by the administration or student. In fact, closing statements should be encouraged. Because a closing statement is a summary of what has already been presented, it can help board members piece key facts together or help the hearing officer organize his thoughts prior to writing a report for the board.

The administration also may wish to introduce broader arguments in favor of expulsion during the closing statement, including information from the student's prior record.

The closing statement gives the student an opportunity to cite extenuating circumstances, question the severity of the proposed punishment, present evidence as to his good character, and otherwise plead a case for remaining in school. In addition to reviewing facts, the closing statement will probably involve emotional appeals.

Deliberation and decision

In most states, including Illinois, the school board will adjourn the hearing and then meet by itself to deliberate. The members of the board will either have heard arguments first-hand or will have studied the hearing officer's written report.

A question that frequently arises is, who should take part in the board's deliberations? The board may want to have its attorney on hand to provide legal advice. There is a potential conflict of interest if the attorney presented the case on behalf of the administration. At the least, a different attorney from the same law firm should advise the board, or the board may want the district superintendent to provide guidance, particularly regarding the appropriate punishment. In addition, the administrators who made the case for expulsion should not be present during the board's deliberations.

In its deliberations, the school board should first address the question of guilt before going on to the issue of punishment. This sequence is advisable even following an informal hearing, if the question of expulsion hinges on the question of whether the student committed a specific infraction. The board has only to weigh the appropriateness of expulsion as a punishment where guilt is not in dispute.

Note that guilt is not always a yes or no proposition. The student may deny that he was involved in the alleged incident at all, of course. But he also might argue that the administration has distorted or exaggerated the facts or that the incident occurred in a different way from what the administration has claimed. Thus, the board may ultimately decide that the student is guilty of an infraction that is slightly different from the one alleged by the administration, and that infraction may or may not be punishable by expulsion. Although the board may grope for the truth in arriving at a verdict of innocent or guilty, it is not an investigative body. That is the administration's function, and the board should limit itself to examining the evidence, keeping in mind that the burden is on the administration to prove its case by "a preponderance of the evidence." In addition, the board can rely on only information presented at the hearing. It cannot rely on personal information or new information obtained after the hearing. The board can consider any additional information only if the hearing has been recon-

vened and the student given an opportunity to respond to it.

If after discussing the evidence there is consensus among members of the school board that the student is not guilty, the board should convene in public session and vote down a motion to expel.

On the other hand, if board members believe the student did indeed commit the alleged infraction, then the superintendent may be asked for his recommendation regarding punishment. The student's past record may be considered at this point also.

The two-part hearing—As discussed in Chapter 2 (under "Board of Education") a school board may choose to address the issue of punishment in a separate hearing for extra-ordinary cases. The board would reconvene the hearing after a finding of guilt to allow both the administration and the student to present information regarding the appropriateness of expulsion. This second hearing would occur after the board has deliberated and reached a consensus that the student is guilty of the charges alleged by the administration. Note that this bifurcated approach has not been required by any court. Under current law, it appears that giving the student an opportunity to rebut the administration's allegations and an opportunity to make a closing statement will provide satisfactory due process protections. Where bifurcation is called for, the school board can provide the necessary protections during its subsequent deliberations by addressing the question of guilt before considering the student's past record.

The hearing officer—The same procedures should be followed where the hearing is before a hearing officer as if it were before the full school board. The hearing officer should structure his report in a way that enables the school board to deal first with the nature of the infraction and the question of the student's guilt. The hearing officer may submit two reports, one describing the evidence regarding the charge and the other describing the student's history. The board would review the second report after it determined the student committed the infraction. Again, this is not required and the hearing officer can simply place the student's history in a separate section of the report.

Formal action

In Illinois and most other states, a student can be expelled only by a formal vote of the school board at a public meeting. Once the school board has considered the evidence and arguments in executive session, it must convene at a public meeting to take formal action on a motion or resolution to expel.

If a majority of the board determines that the student did not commit the infraction, the student's record should be expunged and he should be given an opportunity to make up any school work or tests that he might have missed. If the board majority determines the student committed the infraction and votes for expulsion or some other punishment, then the student must be so notified as discussed later.

A question often arises as to whether the student's name should be used in the public meeting. The statutes in Illinois and many other states do not provide the answer to this question. Many school boards make it a practice to protect the student's privacy by referring to a code number, the student's identification number or to "the student discussed in closed session." This practice has not been challenged to date and probably will not be. It is in the student's best interests to follow such a practice, so the student is not likely to question it. However, in some more sensational cases, the public or the news media may object to not hearing the student named in the board resolution to expel. Moreover, many attorneys in Illinois believe there is no legal basis for referring to the student in any way other than by name. In other words, the practice of referring to the student by a code number or other euphemism is probably not legally defensible. On the other hand, the practice does not appear to violate any right of the student and is unlikely to become a basis for overturning the expulsion through litigation. The school board should be guided by the advice of its attorney in deciding whether to mention the student's name in public, so that its practice can reflect any changes in law.

Decision and notification

In Illinois and most other states, the school board is under no legal obligation to issue a written explanation of its decision in student disciplinary cases. Where there is no such requirement placed on school boards, most attorneys recommend that

Sample notice of expulsion

(Date)

Dear *(parents)*:

After carefully weighing the information and evidence presented to it, the Board of Education of District *(number)* at its meeting on *(date)* voted to expel your son (or *daughter)*, *(student's name)*, from school for the period beginning *(date)* until *(date)*. During this period *(student's name)* is not to attend classes or be involved in any school activities in School District *(number)*.

(Student's name) may call the school office at *(telephone number)* to arrange a date to return books and other school-owned materials, as well as to pick up any personal effects remaining at school. After the expulsion period ends on *(date)*, *(student's name)* may enroll in summer school or otherwise return to a full school program. Arrangements should be made early with the school.

Both the administration and the Board of Education regret that this action had to be taken.

Sincerely yours,

(name)
Secretary, Board of Education
School District *(number)*

the board not issue a written decision. Where a written decision is required, or appears to be advisable in special circumstances, the decision should be drafted in consultation with the board's attorney.

However, the board is required to notify the student and parents of its decision—even though these people may have been in attendance at the meeting when the school board voted on the expulsion motion. As shown in the sample letter above, the letter should be from the board of education and, among other things, should set forth the beginning and ending dates of the expulsion period.

The official record

In Illinois, as in most states, there is no statutory procedure to have a court review a school board's decision to expel a stu-

dent. Review may be sought under the common law order of *certiorari*. Such review occurs infrequently, however. If decisions to expel are reviewed, they occur when the student brings charges against the board for violation of his substantive or procedural due process rights. Therefore, a very small percentage of such cases go to court. However, it is advisable to prepare for such a possibility by organizing an accurate and complete record of all proceedings.

As indicated earlier, it is not necessary to have a court reporter's record. It is advisable to have at least an informal record, including a tape recording of the hearing and all documents from the hearing. The tape, all of the documentation entered into the record, and copies of any official meeting minutes should be located where they (a) will remain confidential in accordance with laws regulating student records, and (b) can be readily gathered together by authorized personnel if and when they are needed.

State laws vary as to what material can be placed in the student's file. Under the federal Family Educational Rights and Privacy Act, all information about the student must be placed in the student's file. The school board minutes should make reference to any evidence or related information filed elsewhere in the event such evidence needs to be located. In Illinois, for example, the school board is required to keep minutes of closed meetings. Even though those minutes may never be made public, it is advisable to incorporate the student's confidential file by reference rather than keep student-related documents with the minutes.

5/Some related questions

Should the presiding officer deny the admission of hearsay evidence or follow other strict rules of evidence?

The courts do not require school boards to observe the strict rules of evidence required in a criminal proceeding. There have been instances in Illinois, however, where hearsay evidence has been thrown out, particularly student statements presented by other people when there has been no showing that a student may be placed in danger by testifying. If student hearsay statements are used, it is recommended that some evidence be introduced showing that testifying will place the student in danger. The difficulty lies in presenting such evidence without again relying on hearsay. The best advice is: Do not base an expulsion recommendation on uncorroborated hearsay evidence. Second-hand information may be useful if it supports first-hand information or eyewitness accounts.

It would be helpful, in formal situations, to have an attorney review questions regarding rules of evidence. Much depends upon the circumstances.

Should the administration use students as witnesses in presenting a case for expulsion?

If testifying presents no hardship or danger to the students or no problems of peer pressure, there is no reason why they should not be asked to testify. Note, however, that they cannot be forced to testify; the school board has no subpoena powers.

Also note that credibility will be a problem, particularly with younger students. The administration must judge each situation on its own merits, but it is generally advisable to rely on students only to corroborate adult testimony. Unless a student witness is highly mature, do not build a case exclusively on one student's testimony if it can be avoided.

Should the board of education allow a student to withdraw from school before an expulsion hearing is conducted?

The board cannot stop a student from withdrawing. However, that does not mean that the withdrawal process must be completed before the board can take action. It is recommended that the hearing proceed and the board consider the case before the withdrawal is completed, otherwise the student may re-enroll.

Can we require a student to testify at his own expulsion hearing?

Because the board does not have subpoena powers and cannot require a student to even attend his own expulsion hearing, the real question is whether the board can treat a refusal to testify as an admission of culpability. The general answer is, maybe! The courts are not in agreement as to whether a student may invoke the Fifth Amendment to the U.S. Constitution, which protects the individual from being forced to testify against himself. Some have said a student can invoke the Fifth Amendment, others have said a student cannot, and others have said a student can only do so if there is a criminal charge pending at the time of the hearing.

No adverse inference should be drawn against a student who invokes the Fifth Amendment if it can be shown that his testimony can be used against him in a criminal proceeding. However, it may be possible for the student to suppress his hearing testimony during subsequent criminal proceedings. If that is the case, the school board may rightfully expect the student to testify at the disciplinary hearing. However, when a student invokes the Fifth Amendment or refuses to testify for whatever reason, the school board should consult its attorney before deciding how to treat the problem.

How should the administration deal with contraband involved in an expulsion case?

Here is another question calling for local guidance from your attorney. Laws regarding contraband vary among different jurisdictions. Where illegal drugs or weapons are involved, for example, it may be illegal in some places for administrators to keep them in their possession, even though they are part of

the evidence against the student. In any case, you will need the cooperation of your local law enforcement agency because illegal contraband will probably be involved in a criminal proceeding. Leaving such material in the hands of administrators could make the material inadmissible as evidence in a criminal proceeding.

Where the law permits a student disciplinary hearing to be held at a meeting closed to the public, should we honor the parents' request to open the meeting to the public?

Although there appears to be no compelling legal right of parents to demand an open hearing, different attorneys may give different advice on this question. After all, the meeting is closed for the student's benefit; if he wants it open, what can be the harm? Other attorneys will contend, however, that the student and parents may not choose what is best for the student in this instance—or at least a court might hold to that effect. Any harm befalling the student through a public hearing, such as damage to his reputation, might then be placed at the board's doorstep. Therefore, there is no reason to grant a request to open up the hearing.

Again, when in doubt, consult your attorney.

Appendix

Some pertinent case law

This summary of pertinent case law is largely excerpted and adapted from Chapter 12, "Student Rights and Responsibilities" in the 1999 edition of Illinois School Law, *published by the Illinois Institute for Continuing Legal Education, and the 2001 supplement to that edition. It is reprinted with permission of the publisher and co-authors Heidi Katz, Paulette A. Petretti, David A. Koperski and Lise Alexa Peters.*

Additional cases and commentary have been added to the excerpt by Alan M. Mullins.

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Procedural due process

Due process has procedural and substantive aspects. Procedural due process is the method by which a person establishes, defends or asserts rights, most often in a judicial or quasi judicial hearing. Substantive due process will be subsequently discussed. Procedural due process does not have a fixed meaning. In *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 95 L.Ed. 817, 849 (1951), the Court stated, "Due process is not a mechanical instrument. It is not a yardstick. It is a process."

The recognition of students' constitutional rights to procedural due process has led the courts to a review of school boards' disciplinary tools, particularly of suspension and expulsion. The landmark case of *Dixon v. Alabama State Board of Education,* 294 F.2d 150,155 (5th Cir.), *cert. denied,* 368 U.S.930 (1961), set the mode for this disciplinary review. The

Dixon court, in reviewing an expulsion case, said:

> "Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law."

Pre-discipline hearing

Goss v. Lopez, 419 U.S.565, 42 L.Ed.2d 725 (1975), set out the procedural standard that must be followed before discipline is imposed. Before discipline is imposed: (a) there must be an informal discussion between the disciplinarian and the student regarding the alleged misconduct; (b) during that informal meeting, the disciplinarian must discuss with the student the basis for the proposed discipline; and (c) the student must be given the opportunity to respond to the information presented. Notice does not have to be given to a student's parents before a pre-suspension hearing can be conducted. *Zehner v. Central Berkshire Regional School District*, 921 F.Supp. 850 (D.Mass 1996).

If there is an immediate danger to students, persons or property, the student may be summarily removed from the school, but a pre-suspension discussion must then be scheduled as soon as is practicable. A student was removed from school before an informal discussion because she remained belligerent in *C.B. By and Through Breeding v. Driscoll*, 82 F.3d 383 (11th Cir. 1996). The court approved the use of a telephone pre-suspension hearing for that reason. *Goss* also required that if the preliminary discussion indicates a more formal and extended discussion is required before the suspension is imposed, such greater process should be given to the student. The requirement of greater process has been generally ignored, with school districts usually providing a formal hearing after or during the suspension if requested for a suspension or expulsion.

Substantive due process

Substantive due process is the requirement that the rules should be reasonably defined, fairly administered and reasonably related to a valid purpose. Substantive due process refers to the *why*; procedural due process refers to the *how*.

Disciplinary rules

The *Illinois School Code*, 105 ILCS 5/10-22.6, authorizes the suspension and expulsion of students who are guilty of gross disobedience or gross misconduct. These statutory provisions are the general standards. The school board must also frame specific grounds for discipline in order to meet the requirements of substantive due process. The board has authority to do so under the *School Code*, paragraph10-20.5, which is its rule-making authority.

School boards must promulgate disciplinary rules worded so that students are informed of what conduct will lead to discipline. Substantive due process, however, does not require school officials to describe every type of conduct in which mischievous students might engage or for which discipline might be imposed. That would be impossible. The rules need not be written with the specificity of criminal rules either. Thus, the court in *Fuller v. Decatur Public School Board of Education School District 61*, 78 F. Supp. 2d 812 (C.D. Ill. 2000) determined that a rule which prohibited "gang - like activity," and included four descriptions of such activity, did not violate due process. Also see *Coffman v. Kuehler, 409* F.Supp.546 (N.D. Tex. 1976), where rules providing discipline for disrespect, loitering and rowdy behavior were found not unconstitutionally vague, and *Weimerslage v. Maine Township High School District 207*, 29 F.3d 1149 (7th Cir. 1994) aff'g. 824 F.Supp. 136 (N.D. Ill. 1993).

In addition to specific rules, the board may have a general catch-all rule, such as one covering all other conduct which substantially and materially disrupts the school system, as the grounds for discipline.

Zero-tolerance — Recently, zero-tolerance policies have come under attack on due process grounds. There have been a number of cases in which the disciplinary action was upheld, including two Illinois cases. The court in *Doe v. Board of Education of Oak Park and River Forest High School District 200*, 115 F3d 1273 (7th Cir. 1997) determined that there was no requirement that the board consider mitigating factors. The expulsions in *Fuller v. Decatur Public School Board of Education District 61*, 78 F. Supp. 2d 812 (C.D. Ill. 2000), aff'd. 251 F.3d 662 (7th Cir. 2001) were upheld because the board had

passed a general resolution concerning zero-tolerance of violence but the resolution was not considered in making the expulsion decisions. Also see *Lyons v. Penn Hill School District, 723* A. 2d 1073 (Pa. Commw. 1999); *Kolesnick by and Through Shaw v. Omaha Public School District*, 558 N.W.2d 807 (Neb. 1997) and *E.M. Through S.M. v. Briggs* 922 P.2d 754 (Utah 1996). However, there have also been cases which found zero-tolerance policies to have violated due process. See *Seal v. Morgan,* 229 F3d 567 (6th Cir. 2000), which found the board violated due process by applying zero-tolerance policy to a student who was unaware that a friend put a weapon in his car and *Colvin ex rel. Colvin v. Lowndes County, Mississippi School District,* 114 F. Supp. 2d 504 (N.D. Miss. 1999), which found due process was violated when mitigating circumstances were not considered.

Zero-tolerance is an issue that will be considered again by the courts. It is advised that a school board consult with its attorney before disciplining a student based on a zero-tolerance policy.

Elements of a valid disciplinary hearing

Adequate notice

Illinois law requires that notice be given by registered or certified mail. The Illinois Supreme Court has ruled that a school board does not loose its authority to expel a student if the student receives notice by other than registered or certified mail as long as the student had actual notice. *Stratton v. Wenona Community Unit District No. 1*, 133 Ill.2d 413, 551 N.E.2d 640 (1990). Notice of the hearing must be given a sufficient time prior to the hearing to enable the student to prepare a defense. The court in *Linwood v. Board of Education (Peoria School District 150),* 463 F.2d 763 (7th Cir. 1972), approved a notice of hearing received five days before the proceeding. The Illinois Supreme Court in *Stratton v. Wenona Community Unit District No. 1*, 133 Ill.2d 413, 551 N.E.2d 640 (1990) found that a two day notice was sufficient where there had been a pattern of misconduct and the parents were kept well informed of the misconduct which lead to the eventual expulsion. Furthermore,

the Board offered to continue the hearing if the parents agreed to continue the student's suspension and the Court found that condition reasonable because the suspension would still fall within the statutory maximum period. If the parents refuse to accept the notification by not accepting a letter of notification, they cannot argue lack of notice. *Wright v. Texas Southern University,* 392 F.2d 728 (5th Cir. 1968).

Statement of charges

The notice must (a) inform the student of the specific acts of misconduct charged and (b) inform the parents that an opportunity to present written and oral testimony to rebut that evidence will be afforded the student. The Illinois Supreme Court in *Stratton* determined that a notice which stated that the student would be considered for expulsion "for gross misconduct, disobedience and disrespect," but which did not describe the misconduct, was sufficient. However, it is advisable to describe the misconduct in more detail.

Notification of right to representation

Under the Illinois School Code, the notice to the parents of an expulsion hearing must inform the parents of the student's right to be represented by counsel.

An orderly hearing

An orderly hearing is a proceeding before an impartial tribunal in which school officials present their case by written evidence or by witnesses, there is cross-examination of the evidence presented and the student is allowed to present evidence. The school board has been held to be an impartial hearing body. See *Goss v. Lopez,* 419 U.S. 565, 42 L.Ed.2d 725 (1975), and *Linwood v. Board of Education (Peoria School District 150),* 463 F.2d 763 (7th Cir. 1972). The hearing does not have to be conducted with the same formality as a criminal trial or juvenile court proceeding. *Baxter v. Round Lake Area Schools*, (856 F.Supp. 438, N.E. Ill. 1994) The hearing may, but need not, be recorded.

Additional hearing issues

Written findings

No cases have required the decision makers to state their findings in writing or to indicate the evidence relied upon. See *Goss v. Lopez*, 419 U.S. 565, 42 L.Ed.2d 725 (1975).

Joint hearings

A joint hearing of several students was found to be permissible in *Buttny v. Smiley*, 281 F. Supp. 280 (D. Colo. 1968). In that case, the hearing concerned the expulsion of 65 students who had locked arms together to deny access of university officials to a university building.

Evidentiary rules

Testimony in discipline hearings is not generally subject to the rules of evidence. However, as discussed below, two Illinois courts have determined that expulsions cannot be based upon hearsay statements. Incompetent or irrelevant evidence is admissible, provided the evidence is substantial. *Whitfield v. Simpson*, 312 F.Supp. 889 (E.D.Ill. 1970). *See Tasby v. Estes*, 643 F.2d 1103 (5th Cir. 1981). Schools also do not have to exclude evidence obtained from an illegal search as is done in criminal trials. *Thompson v. Carthage School District*, 87 F.3d 979 (8th Cir. 1996).

Right to confront and cross examine witnesses

Two Illinois courts have ruled that students have a right to confront and cross examine witnesses. The court in *Colquitt v. Rich Township High School District No. 227*, 298 Ill.App.3d 856, 699 N.E.2d 1109 (1st Dist. 1998) held that school officials could not rely on written statements of student witnesses but had to have the witnesses testify at the hearing unless there was evidence of danger to the students. Relying on *Colquitt*, the court in *Scionti v. Community Unit School District 301*, 295 Ill. App. 3d 1125, 726 N.E.2d 234 (2nd Dist. 1998) (Rule 23 Order) reversed an expulsion because the board relied on unnamed student hearsay statements described by administrators. Courts in other states have ruled otherwise. The use of written

statements from student witnesses, rather than their testimony, was approved in *West v. Derby Unified School District*, 23 F.Supp.2d 1223 (D. Ka. 1998); *L.Q.A. by and through Arrington v. Eberhart*, 920 F.Supp. 1208 (M.D. Al., 1996) and *Brewer by Dreyfuss Austin Independent School District*, 779 F.2d 260 (5th Cir. 1985). Likewise a written statement from a teacher was sufficient in *Johnson v. Humble Independent High School*, 799 F.Supp. 43 (S.D. Tx. 1992) even though the student was charged with assaulting that teacher.

Again, it is advisable for a school board to consult with its attorney before disciplining a student based on written statements, hearsay statements or second-hand reports rather than the direct testimony of witnesses.

Factors to consider when deciding whether to expel a student

The courts give school officials broad discretion in determining what discipline is appropriate for each case of misconduct. In reviewing whether that discretion has been abused, courts will look at:

1. the egregiousness of the misconduct;
2. the history or record of the student's past conduct;
3. the likelihood that such conduct will affect the delivery of educational services to other students;
4. the severity of the punishment; and
5. the interests of the student.

Robinson v. Oak Park and River Forest High School, 213 Ill. App. 3d 77, 571 N.E. 2d 931 (1st Dist. 1991).

It is recommended that school boards consider these criteria when deciding the discipline to be imposed for student misconduct.

Use of prior school record

A prior record of the student's improper conduct in the school, though not related to the incident in question, is generally admissible in school disciplinary proceedings to be used in determining the punishment. In *Pierce v. School Committee of New Bedford*, 322 F. Supp.967 (D. Mass.1971), the court permitted the school to introduce in evidence during an expulsion

hearing the student's prior high school record, including 13 previous detentions.

Fifth Amendment concerns

Questions about the student's Fifth Amendment privilege against self-incrimination may arise at a disciplinary hearing when the student is also involved in a concurrent criminal proceeding. In *Caldwell v. Cannady,* 340 F. Supp. 835 (N.D. Tex. 1972), the court held a student has a right to remain silent and not testify at his expulsion hearing on the claim of possible self-incrimination when there is a pending criminal proceeding. However, a student has no right to remain silent if the student has the right to suppress the incriminating evidence divulged in the disciplinary proceedings in any subsequent criminal proceeding.

In *Garrity v. New Jersey,* 385 U.S. 493, 17 L.Ed.2d 562 (1967), the Court held that evidence discovered during an attorney general's investigative hearing could be suppressed in a subsequent criminal trial arising from the same investigation. In *Furutani v. Ewigleben,* 297 F.Supp.1163 (N.D.Cal. 1969), the court found that under the reasoning of *Garrity* a pending criminal charge does not allow a student to stop his expulsion hearing from proceeding or to remain silent during it because any incriminating statements he made could be suppressed in the criminal proceedings. See also *Nzuve v. Castleton State College,* 133 Vt. 225, 335 A.2d 321 (1975).

A somewhat different twist on the issue occurred in *Gabrilowitz v. Newman,* 582 F.2d 100 (1st Cir. 1978). In that case, the university had a rule on disciplinary hearings that the hearing body could not draw any adverse inference from the silence of the student at a disciplinary hearing. The court held that, because of the university rule, any testimony during the hearing was entirely voluntary and admissible at any criminal proceeding. The court found that if the student's testimony had been compelled at the disciplinary hearing, his testimony would no longer be voluntary, and he could rely upon the rule of *Garrity v. New Jersey* to suppress that testimony during a subsequent criminal trial.

If there are no pending criminal proceedings, there would appear to be no Fifth Amendment issue, and a school may

require a student to testify unless it has a rule, as in the *Gabrilowitz* case, allowing the student not to testify. See *Goldberg v. Regents of the University of California,* 248 Cal.App.2d 867, 57 Cal.Rptr. 463 (1967).

Some school boards may choose to avoid addressing Fifth Amendment issues by adopting policies that allow students not to testify at their own disciplinary hearings. However, under the reasoning in the *Gabrilowitz* decision, any statement those students make at their hearings will be voluntary and most likely will not be suppressed in a criminal proceeding. Whether student statements made at a student disciplinary hearing can be suppressed at a criminal proceeding depends on the particular facts of each case. Therefore, school officials should obtain the advice of legal counsel if there is any possibility that the alleged infraction could be the subject of a criminal prosecution.

Non-dispositive hearings

A meeting or hearing which does not affect a student's rights is not subject to due process. *Hannah v. Larche,* 363 U.S. 420, 4 L.Ed.2d 1307 (1960). In *Baker v. Hardway,* 283 F.Supp. 228 (S.D.W.Va. 1968), a hearing before a student disciplinary committee which did not have dispositive powers and could make only a recommendation was held not to be a hearing requiring procedural safeguards. In *Madera v. Board of Education, City of New York,* 386 F.2d 778 (2d Cir. 1967), the court construed the hearing in question to be a counseling meeting and, since no direct punishment or consequences could result from the hearing, no due process was required.

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Author(s):	Gene J. Cartwright; Allen D. Schwartz	
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